FELLERS SNIDER
ATTORNEYS AND COUNSELLORS AT LAW
FELLERS SNIDER BLANKENSHIP BAILEY & TIPPENS, P.C.

OKLAHOMA CITY ■ TULSA

DIRECT ROBERT G. McCAMPBELL
rmccampbell@fellerssnider.com
T (405) 239-7252
F (405) 232-9659

May 27, 2014

Governor Mary Fallin
State Capitol
2300 N. Lincoln Blvd., Rm. 212
Oklahoma City, OK 73105

Re: HB 3399

Dear Governor Fallin,

I write on behalf of the National Association of School Boards of Education. We want to express our concern about the constitutionally of section 4 of HB 3399.

The Legislature has already set policy in terms of the courses and skills to be taught in public schools, *e.g.* 70 O.S. § 11-103.6. Section § 3 of HB 3399 directs the State Board of Education ("Board") to develop detailed "subject matter standards," but then § 4 makes the Legislature part of the process by having the Legislature approve or disapprove the standards, or "amend" the standards in whole or in part, and by also giving the Legislature the power to give "instructions" to the Board with respect to disapproved standards. This procedure is unconstitutional for two reasons. First, it infringes on the Board's constitutional authority under Okla. Const. art. XIII § 5. Second, it constitutes a violation of the separation of powers, with the Legislature enmeshed in executive branch operations.

This letter does not dispute the Legislature's authority to opt out of Common Core. Rather, this letter will show that the manner in which HB 3399 is designed is constitutionally infirm.

## THE BOARD'S CONSTITUTIONAL AUTHORITY

The Board is a Constitutional body granted authority over the "supervision of instruction in the public schools." Okla. Const. art. XIII, § 5. "Every positive delegation of power by the Constitution to one officer or department of government implies a negation of its exercise by any other officer or department." *Board of Regents v. Baker*, 1981 OK 160, 638 P.2d 464, 466. "[O]ne constitutional body may not exercise a function expressly set apart to another constitutional body." *Ethics Com'n v. Cullison*, 1993 OK 37, 850 P.2d 1069, 1076, citing *Tweedy v. Okla. Bar Ass'n*, 624 P.2d 1049, 1053-54 (Okla. 1981).

In a similar situation, the Supreme Court has held that the Legislature could not encroach on the authority of constitutionally created universities. *Baker* at 467 (Legislature could not require Board to give pay raises to faculty members.) "We have no doubt that in elevating the status of the Board from a statutory to a constitutional entity, the people intended to limit legislative control over University affairs." 638 P.2d at 467. *Accord, Board of Regents v. Merit Protection Com'n*, 2001 OK 7, 19 P.3d 865 (Application of the whistleblower act to universities would "clearly offend the exclusive authority granted them by the terms of Art. 6 § 31a, Art. 13-A and Art. 13-B of the Oklahoma Constitution."). *Accord* A.G. Opinion 71-322 (Legislature could not change the courses of study at a particular college because Art. XIII-A gives authority over the college to the Board of Regents for Higher Education). Just as the universities and colleges were protected from legislative intrusion by Art. XIII, XIII-A and XIII-B of the Constitution, the Board is protected from legislative intrusion by Art. XIII.

A similar statute was found to violate a similar constitutional provision in *W. Virginia Bd. of Educ. v. Hechler*, 180 W. Va. 451, 453, 376 S.E.2d 839, 841, 843 (1988). In that case a statute requiring rules concerning school buses to be reviewed by a legislative oversight commission was found unconstitutional. The court noted that the state constitution (a) "gives a constitutionally preferred status to public education in this State" and (b) distinguishes the Board of Education from "most other administrative agencies." *Id.* at 841, 843. The court held that "supervision" was "not an axiomatic blend of words designed to fill the pages of our State Constitution," but was a "meaningful concept to the governance of schools and education in this state." *Id.* at 842. The court found that the Legislature's "attempt to impede this process is not consistent with the general supervisory powers conferred upon the Board by art. XII § 2 of the State *Constitution*." *Id.* at 842 (emphasis in original). The legislative oversight was found to "pose an interference" with "the Board's general supervisory functions." *Id.* at 843. The same principles would apply in this case.

**SEPARATION OF POWERS**

HB 3399 § 4 also represents a violation of Oklahoma's constitutional separation of powers, particularly because it gives the Legislature the power to "amend" the subject matter standards and the power to give "instructions" to the Board regarding disapproved standards. Okla. Const. art. IV § 1. The Constitution prohibits "legislative intrusion upon the functions assigned by the constitution to the executive." *Fent v. Contingency Review Bd.*, 2007 OK 27, 163 P.3d 512, 521; Okla. Const. art. 4, §1. "[E]ach department of the government shall be kept independent in the sense that the acts of each shall never be controlled by or subjected, directly or indirectly, to the coercive influences of either of the other departments." *In re Oklahoma Dep't of Transp. for Approval of Not to Exceed $100 Million Oklahoma Dep't of Transp. Grant Anticipation Notes, Series 2002*, 2002 OK 74, 64 P.3d 546, 549 (*"In re ODOT"*). Under the separation of powers provided by the Oklahoma Constitution, "the Legislature cannot perform the duties of the executive department; neither have they a right to restrict or control or merge with the legislative authority the executive authority." *Wentz v. Thomas*, 1932 OK 636, 15 P.2d 65, 109.

The Supreme Court adopted a four part test in *In re ODOT*, 64 P.3d at 550, to determine whether there is a violation of the separation of powers:

1. What is the "essential nature of the power being exercised? Is the power exclusively executive or legislative or is it a blend of the two?"

2. What "degree of control is the Legislature trying to exercise. Is the influence coercive or cooperative?"

3. "Is the intent of the Legislature to cooperate with the executive by furnishing some special expertise of one or more of its members or is the objective of the Legislature obviously one of establishing its superiority over the executive department in an area essentially executive in nature?"

4. What is the "practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available?"

Application of the relevant factors here demonstrates the separation of powers problem. First, the Board is an executive agency chaired by the Superintendent of Public Instruction. The default members of the Board are the Governor, Secretary of State and Attorney General – all executive branch officials. Art. XIII §3. The members of the Board are appointed by the Governor. 70 O.S. § 3-101. Significantly, Oklahoma is the only state where the members of the Board of Education serve at the pleasure of the Governor.

Second, in HB 3399 the Legislature is exercising a coercive degree of control over the Board. The Court has found the Legislature to be exercising improper control by requiring the Governor to consult with the Legislature for certain expenditures, *Fent v. Fallin*, 2011 OK 100, 271 P.3d 798, 799, by requiring the Contingency Review Board including the President Pro Tempore of the Senate and Speaker of the House to approve any expenditures of an already-appropriated fund, *Fent v. Contingency Review Bd.*, 2007 OK 27, 163 P.3d 512, 522, and by requiring a Legislative Bond Oversight Commission, made up of legislative members, give prior approval to the issuance of highway bonds, *In re ODOT*, 64 P.3d 546, at 547. None of those cases involved the same degree of control as here, where the Legislature has assigned a task to the Board but then would become reinvolved in the process by amending the standards or providing instructions to the Board about particular standards.

As to the third factor, in HB 3399 the Legislature is not "furnishing some special expertise" of certain legislators. HB 3399 would implant the entire Legislature into the formulation process for the subject matter standards and therefore violate the Constitution's separation of powers provision. In *In re ODOT*, 64 P.3d at 552, the Supreme Court rejected as a violation of the separation of powers the creation of a legislative bond oversight committee, staffed with legislators, as a "mini-legislature implanted in the note-approval process."

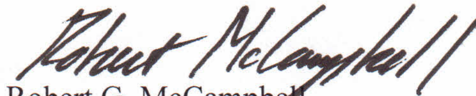
The fourth factor, "the practical result of the blending of powers as shown by actual experience," cannot yet be judged.

Under the test the Supreme Court endorsed in *In re ODOT, supra,* HB 3399 would likely be found to be unconstitutional under the separation of powers doctrine.

**CONCLUSION**

We urge you to consider the constitutional problems in section 4 in your review of HB 3399.

Sincerely yours,



Robert G. McCampbell
for the Firm

RGM/lf
cc : Steve Mullins, General Counsel
Kristen Amundson, NASBE